Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

ALL DIRECT TRAVEL SERVICES, INC., et al.,

Petitioners,

vs.

DELTA AIR LINES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is a party to a contract, which is silent as to what constitutes a breach and damages precluded, as a matter of law, from bringing an action under the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. 1961, *et seq.*?

May extortion lie where the defendant is not entitled to the money demanded even if the threats to obtain that money are not inherently "wrongful"?

PARTIES TO THE PROCEEDING

All Direct Travel Services, Inc., a corporation with no parent or publicly held company owning 10% or more of the corporation; Donald McGenty dba Ann's Crossroads Travel Center, individually and on behalf of all others similarly situated.

Delta Air Lines, Inc., a corporation with no parent corporation or publicly held company owning 10% or more of Delta's stock.

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BASIS FOR SUPREME COURT JURISDICTION

The Court of Appeals for the Ninth Circuit entered its judgment on January 6, 2005. Petitioners, All Direct Travel Services, Inc. and Donald McGenty dba Ann's Crossroads Travel Center ("Petitioners") seek review of that judgment on a writ of certiorari.

The present petition is timely filed under Rule 13.1 of this Court.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review a judgment by a federal court of appeals on a writ of certiorari.

STATUTES INVOLVED IN THE CASE

Racketeer Influenced and Corrupt Organizations Act of 1970, 18 U.S.C. § 1961, *et seq.* and the Hobbs Act, 18 U.S.C. § 1951.

STATEMENT OF THE CASE

In September of 2001, All Direct Travel Services, Inc. ("All Direct") and Donald McGenty dba Ann's Crossroads Travel Center ("Crossroads") filed a putative class action on behalf of themselves and approximately 30,000 travel agents for violations of the Racketeer Influence and Corrupt Organizations Act of 1970, 18 U.S.C. 1961, *et seq.* ("RICO"). The allegations are that in or around 1995 Delta devised an escalating scheme to defraud travel agents based on a pattern and practice of sending hundreds of thousands of invoice – like demands for money ("debit memos") which are unrelated to any damages alleged by

Delta and in amounts up to 100 times the fee earned for the issuance of an airline ticket.

In the early 1990s, debit memos were quite uncommon and if issued, the monetary demands were usually very small. Appendix A-11. However, in or around 1995, rather than "partnering" with travel agents, Delta started competing with them for customers by reducing and finally eliminating commissions paid for issuing tickets and setting up rigid requirements for travel agents that it did not have for its own reservation agents or customers that book directly through the Internet. Appendix A-11, A-12. Concurrently in order to increase its revenue at the expense of travel agents, Delta dramatically increased the number of debit memos issued and the amount of money demanded for each debit memo. Appendix A-11. For example, the dollar amount of debit memos rose from $21.8 million in 1998 to $71.8 million[1] in 1999 with fewer travel agents writing fewer tickets. Appendix A-18, A-19.

The dramatic increase resulted from Delta's expansion of the number of things for which it charged travel agents such as the alleged improper usage of tickets by passengers, essentially holding travel agents strictly liable for the acts of their clients and concurrently, increasing the amount charged per debit memo by programming its computer system to intentionally issue debit memos based on artificially high "replacement fares" (the fares Delta alleges the passenger "should" have paid) which are the highest one-way fares in Delta's markets. Appendix A-12. The result is that the average debit memo increased from approximately $150.00 in the early 1990s to over $868.00

[1] This is based on debit memos collected and written off by Delta.

by 2001. Appendix A-21, A-26. Delta demands payment within a set period of time and if not paid, threatens to remove the travel agent's ability to issue Delta tickets which would cause a full service travel agency severe economic harm. Appendix A-14, A-15.

Petitioners received many such debit memos during the putative class period. One example is a debit memo All Direct received when two agents each issued a roundtrip ticket to a passenger for $282.50. Appendix A-13, A-14. Months later, after the passenger traveled, Delta determined that the passenger had not used the return portion of each ticket and had violated one of Delta's tariff rules.[2] Rather than confronting the passenger, Delta sent All Direct a debit memo with replacement fares of $2280.00, the highest fares in the market, based on *four* one-way fares or two round trips, contending that is what the passenger "would" have paid even though the passenger only made *one* round trip. Appendix A-14.

In another example, Crossroads received a debit memo with a replacement fare of $1341.00 when Delta determined it could not read the issue date on the ticket.

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[2] Courts have looked at this as a passenger's quest to obtain the lowest ticket price for a given destination. *See In re Northwest Airlines Corp. Antitrust Litig.*, 208 F.R.D. 174, 180, n. 7 (E.D. Mich. 2002). Indeed, Supreme Court Justice Antonin Scalia indicated in *Richard Cheney, Vice President of the United States et al. v. United States District Court of the District of Columbia*, 541 U.S. 913, 921, 24 S. Ct. 1391, 158 L. Ed. 2d 225 (2004), that he purchased roundtrip tickets intending to travel one way because the tickets were less expensive than one-way tickets. *Id.* Under Delta's scheme, Delta would hold the travel agent liable for Justice Scalia's ticket usage and charge the travel agent for two one-way fares (approximately four times the cost of the actual ticket) because that is what Justice Scalia "would" have paid and the travel agent "should" have charged.

Because Crossroads has no computer system, it manually calls Delta directly, makes a reservation and calls Delta with the ticket number. Delta knew the issue date of the ticket and that the ticket was correct in all respects, because Delta, itself, had made the reservation and all of the information relating to the ticket was stored in Delta's own computer system. Even confronted with this information, Crossroads was given an ultimatum to either pay $936.20 or lose its ability to issue Delta tickets.

Petitioners do not challenge all debit memos sent to travel agents during the four-year putative class period, but a subset of approximately 250,000 which represent 25% of the debit memos issued and an estimated 75% of the total dollars demanded during that period or approximately $150 million. A-18, A-19. These debit memos are based on two "replacement fares" ("Y" and "B") which are the highest, one-way coach fares in all of Delta's markets.

Delta represents to travel agents that the authority for the issuance of these debit memos is a 60 page adhesion contract called the Agent Reporting Agreement ("ARC Agreement") which is contained in a 700 page Industry Agents' Handbook. Travel agents must enter into this Agreement with the Airlines Reporting Corporation ("ARC"), an agent for Delta that acts as a ticket clearinghouse for Delta and approximately 100 other airlines. A-10. The ARC Agreement sets out a myriad of requirements for travel agents to sell airline tickets, but the only reference to debit memos in this Agreement is a one-line

definition of a debit memo[3] and the Agreement is completely silent on the subject of damages.

Delta cloaks this scheme in an air of legitimacy by representing that it only issues debit memos when it unilaterally determines that a travel agent breaches the Agreement or commits fraud in the issuance of an airline ticket and that it is assessing its "expectancy" damages based on a theory of damages that it is only charging what the travel agent "should" have charged and what the passenger "would" have paid but for the alleged ticketing error. Appendix A-21.

This scheme has been wildly successful because of the enormous power Delta holds over travel agents and its ability to cause them severe economic harm. Travel agents also fear retaliation if any of Delta's policies or practices are challenged, thus leaving them with no real choice but to pay these exorbitant debit memo demands. Appendix A-15.

On October 30, 2002 petitioners filed their motion for class certification which the district court denied on January 13, 2003. Petitioners then filed a 23(f) petition with the Ninth Circuit on January 28, 2003 asking the Ninth Circuit to review the class certification decision. Delta filed a motion for summary judgment on March 3, 2003, and on April 14, 2003, the district court granted the motion stating in part:

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[3] "DEBIT MEMO means any written or electronically transmitted request from a carrier to an agent for payment of an obligation arising under this agreement." There is no definition of the term "obligation" anywhere in the Agreement.

> "[T]he contractual authorization to issue debit memos, which included claims and collection for damages for ticketing violations, and threats to terminate agent agreements do not constitute extortion. The debit memos about which plaintiffs complain do not demonstrate the intentional misrepresentation of a material fact upon which plaintiffs relied to their detriment."[4] Appendix A-7, A-8.

The following day, on April 15, 2003, the Court of Appeals *granted* Petitioners' 23(f) petition.

Thereafter, Petitioners filed a timely appeal, the two appeals were consolidated, and on January 6, 2005, the Court of Appeals filed its unpublished opinion[5] and a judgment was entered the same day. Appendix A-1-4.

The Court of Appeals found "[A]lthough the parties dispute whether the amounts charged in each debit memo are the actual measure of Delta's damages, and, in some cases, whether the ticketing violation even occurred, these issues concern the interpretation of the ARC Agreement and amount to nothing more than a contract dispute." Appendix A-2, A-3. This finding directly conflicts with well established Supreme Court authority and with decisions from almost every other circuit. In *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985), the Supreme Court pointed to a large percentage of

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[4] The district court incorrectly stated the law of mail fraud. The mailings themselves need not be fraudulent or contain misrepresentations as long as they are part of the execution of the fraud. *Schmuck v. United States,* 489 U.S. 705, 710, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989).

[5] Delta has petitioned the Court of Appeals to publish the decision.

published decisions involving commercial and contract disputes and concluded that such use of RICO was proper noting that RICO is to "be liberally construed to effectuate it remedial purposes." *Id.* at 499.

The Court of Appeals also found the mere fact that the ARC contract allows Delta to issue debit memos, the predicate acts of extortion fail because Delta has a right to terminate its relationship with travel agents and "[t]hreatening to do so is not a wrongful economic threat." With reference to the predicate act of mail fraud it concluded "[t]he debit memos do not falsely represent that Delta is authorized to collect these funds as Plaintiffs argue." Appendix A-3.

This recitation of extortion by the Court of Appeals as defined in the Hobbs Act, directly conflicts with the majority of other Circuits and the Supreme Court in *United States v. Enmons,* 410 U.S. 396, 93 S. Ct. 1007, 35 L. Ed. 2d 379 (1973) which held the term "wrongful" did not modify threat, fear, force or violence, but referred to whether one had a lawful claim to the property demanded. *Id.* at 400. Because the Court of Appeals found triable issues of fact as to whether Delta had a lawful claim to the money demanded, a reasonable jury could find a pattern of extortion and mail fraud, and as such, its decision should be reversed in all respects.

In addition to the inconsistency of the Court of Appeals opinion with relevant Supreme Court authority and its conflict with other circuits' decisional law, the result essentially eviscerates the RICO statute and the Hobbs Act, countermanding some 30 years of evolving case law precedent. It also will encourage drafters of both commercial and consumer adhesion contracts to be intentionally vague as to

terms, potentially leading to abuse of the weaker, less sophisticated party to the contract and frustrating the well established principles of contract formation which require material terms to be definite and certain. Additionally, if this decision goes unchallenged, it essentially gives the 100 or so other airline parties to the ARC Agreement unfettered discretion to send wrongful debit memos through a similar pattern of extortion and mail fraud.

ARGUMENT

A. The Finding that a Party to a Contract Is Precluded, As a Matter of Law, from Bringing an Action under the RICO Statute Is in Direct Conflict with the Opinion and Precedent of the Supreme Court and Other Circuits

The Court of Appeals found that Delta had a "legal right under the Agent Reporting Agreement ("ARC Agreement") to collect damages for ticketing violations through the issuance of debit memos." Appendix A-2. It also found that triable issues of fact existed as to whether any ticketing errors were made and whether the debit memos were the actual measure of Delta's damages. However, after concluding this, it found that it simply did not matter because even if Delta was not entitled to the money it demanded, the dispute simply involved the interpretation of the contract. Appendix A-2, A-3.

The Supreme Court has reviewed many racketeering suits with fact patterns similar to the one in this present case. In *Sedima, supra,* the foundation of the suit is based on a contractual joint venture. Sedima based its racketeering causes of action on an alleged over-billing scheme by

Imrex. The parties had a contract that allowed Imrex to send invoices just as the parties in this case have a contract that allows Delta to send debit memos. However, in *Sedima* the allegations were that the parties were submitting fraudulent invoices through a pattern of wire and mail fraud which are some of the exact allegations in this present case. Under the Court of Appeals rationale, the *Sedima* racketeering causes of actions would be dismissed because the parties had a contract and the dispute was simply one of contract interpretation. This rationale countermands the intent of the racketeering statute's liberal-construction mandate and well established Supreme Court authority which has held that a large percentage of commercial and contract disputes form the basis of suits under RICO. *Id.* at 500.

Many circuits have looked at similar fact patterns and found that a contract does not preclude a RICO cause of action. The Fourth Circuit in *Battlefield Builders, Inc. v. Swango*, 743 F.2d 1060 (4th Cir. 1984) reversed the dismissal of a RICO action which the district court saw as "[a]t best, a garden-variety breach of contract," recognizing that the allegation of extortion relating to a contract fell under the RICO statute. *Id.* at 1062. *See also Columbia Natural Resources, et al. v. Zachary Tatum, et al.*, 58 F.3d 1101 (6th Cir. 1995) (RICO suit based on a pattern of wire and mail fraud concerning the parties interests in various oil and gas leases); *Liquid Air Corporation v. Rogers, et al.*, 834 F.2d 1297 (7th Cir. 1987) (affirming a RICO judgment of a district court after a jury trial based on falsifying documents under a dealership agreement to appear that all terms of the agreement had been fully complied with).

The Eleventh Circuit articulated and affirmed this point in a series of decisions beginning with *Arabian*

American Oil Company v. Scarfone, 939 F.2d 1472 (11th Cir. 1991) when it found that "[S]carfone has pointed to no federal case or statute prohibiting a plaintiff from bringing a RICO action where a breach of contract claim also exists." *Id.* at 1478. In *All Care Nursing Service, Inc. v. High Tech Staffing Services, Inc.*, 135 F.3d 740 (11th Cir. 1998) defendants counterclaimed against plaintiffs under the RICO statute alleging fraudulent billing. The Court held that the RICO claims could be brought in actions sounding in breach of contract and that "[m]any RICO cases involve contract disputes." *Id.* at 745. Finally, in *In Re: Humana, Inc. Managed Care Litigation*, 285 F.3d 971, (11th Cir. 2002) the Eleventh Circuit reviewed contracts that doctors had with various HMOs to determine if arbitration agreements could be enforced under RICO. The court found that a "[c]ivil suit remedy under 18 U.S.C.S. 1964(c) of the Racketeer Influence and Corrupt Organizations Act stands apart from any available remedies for breach of contract . . ." *Id.* at 976.

The Court of Appeals, ignoring Supreme Court precedent, and in direct conflict with most of the other circuits relied exclusively on an Eighth Circuit case, *Union Nat'l Bank of Little Rock v. Federal Nat'l Mortgage Association*, 860 F.2d 847, 857 (8th Cir. 1998) in support of the proposition that this present case could not be a RICO case because it simply involved contract interpretation and threatening to do what it had a right to do could not give rise to a RICO claim. *Id.* However, the case is distinguishable as to the facts involving the contract interpretation, and inaccurate as to statement of the predicate act of extortion.

The Eighth Circuit case involved two parties who had entered into a written modification to a contract. Both the

initial contract and modification enumerated what constituted a breach and the remedies for that breach but the court found genuine issues in dispute over the interpretation of that modification. *Id.* In this present case, there is no interpretation issue because the Agreement is silent as to what a debit memo may be issued for, what constitutes a breach of the Agreement, and remedies.[6] The statement regarding the threat which the court determined was not wrongful is simply an incorrect application and statement of the law of extortion as set out in *Enmons, supra.* Most significantly, although the court did not raise the issue or discuss it in the case, the RICO suit would have failed in any event, because a one-time controversy over a contract modification does not constitute a "pattern," an essential element and one that if often missing in RICO actions where a contract is involved.

1. What Distinguishes a Contract Case From a RICO Case is a "Pattern," "Knowledge" and "Intent."

a. The Pattern

There have been courts that have correctly found a simple contract dispute and dismissed the RICO claims but almost without exception, they did so because those cases lacked a "pattern" of racketeering activity. *See River City Mkts., Inc. v. Fleming Foods West, Inc.,* 960 F.2d 1458, 1484 (9th Cir. 1992) (A breach of contract over a one

[6] The Court of Appeals found the unjust enrichment claims could not stand because of an express contract. However, an unjust enrichment claim can proceed when the contract, as here, does not address the issues raised in this case. *See Klein v. Arkoma Prod. Co.,* 73 F.3d 779, 786-87 (8th Cir.), *cert. denied,* 519 U.S. 816 (1996).

month period of time did not constitute a "pattern."); *Condict v. Condict*, 826 F.2d 923, 927 (10th Cir. 1987) (No threat of continuing activity, hence, no pattern).

A "pattern of racketeering activity" requires a showing that the predicate acts are related and they amount to or pose a threat of continued criminal activity. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239-240, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989). The relationship requirement is satisfied by a showing that the predicate acts have the same or similar purposes, results, participants, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated events. *Id.* at 240. The continuity prong of the test is shown by evidence of continued criminal activity such as when the illegal conduct is a "regular way of conducting defendant's ongoing legitimate business." *Id.* at 243. Here, all of the predicate acts have the same or similar purposes, results, participants, victims or methods of commission and are not isolated events. The acts of extortion and wire and mail fraud were intended to increase Delta's profits through the collection of money that Delta was not entitled to receive. The issuance and collection of these debit memos is part of a regular course of business employed by Delta for almost a decade against thousands of travel agents. This conduct still continues and will continue, barring judicial intervention, thereby satisfying the elements set forth in *Northwestern Bell, supra*.

b. Knowledge and Intent

The Court of Appeals found that Delta had a legal right under the Agent Reporting Agreement to collect damages for ticketing violations through the issuance of debit memos. Appendix A-2. There has never been a

dispute that Delta may issue debit memos. Petitioners only challenge the 25% of debit memos issued at the artificial "Y" and "B" fares which Delta has intentionally programmed to be used as replacement fares for ticketing violations and alleged usage violations by passengers. The Court of Appeals determined that a dispute existed as to whether Delta was entitled to the money demanded in the debit memos, but apparently concluded that Delta believed that it was allowed to collect that money resulting in a simple contract interpretation dispute. However, this conclusion is contradicted by Delta's internal documents.

As early as the 1990s, Delta understood that debit memos were unrelated to any damages and viewed debit memos as a "penalty" to "deter" travel agents from violating fare restrictions. Appendix A-21. At that time, Delta paid travel agents 10% commission to issue a ticket ($30.00 on a $300.00 ticket) and determined that a $150.00 debit memo, which Delta stated was "common" at that time creating a penalization rate of 1-to-5 (travel agents would have to issue five tickets to compensate for one debit memo), would "severely impact travel agency revenues" and act as a deterrent. Appendix A-12. By 2002, Delta had stopped paying commissions to travel agents and the average debit memo for ticketing violations had dramatically increased to $868.00 creating a penalization rate of over 1-to-40 based on a $20.00 ticketing fee. Appendix A-26. What is most telling is the fact that Delta's theory of damages is based on charging what the passenger "would" have paid but for the alleged ticketing error. However, in the early 1990s Delta already determined and knew that a passenger "probably was not willing to buy the correct, higher priced fare" (then $150.00), Appendix A-21, suggesting that the passenger certainly would *not*

pay the additional $868.00 that Delta demands in the debit memos at issue in this suit, and affirming that Delta knew that these debit memos were not its damages and that it was not entitled to the money demanded.

This pattern and knowledge raise triable issues as to Delta's intent to defraud and belie the conclusion that this is a simple breach of contract case. The Court of Appeals' findings that disputes existed as to whether any ticketing errors were made and whether the amount of money demanded is Delta's damages raise triable issues concerning RICO predicate acts and its decision should be reversed in all respects so that the RICO elements at issue in this case may be resolved by a jury.

B. The Court of Appeals' Interpretation of Extortion Under the Hobbs Act Conflicts With Well Established Supreme Court Authority and the Majority of Other Circuits.

The term "extortion" under the Hobbs Act means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right. 18 U.S.C. § 1951(b)(2). Justice Stewart, writing for the majority in *United States v. Enmons*, 410 U.S. 396, 93 S. Ct. 1007, 35 L. Ed. 2d 379 (1973) looked at the term "wrongful" and reasoned, "[b]ecause it would be redundant to speak of "wrongful violence" or "wrongful force," Congress must have intended "wrongful" to limit the statute's coverage to those instances where obtaining of the property itself would be "wrongful" because the extortionist has no lawful claim to the property. *Id.* at 400. Under the *Enmons* framework, when the objective is wrongful (i.e., to obtain property to which one "has no lawful claim"), then the

means (e.g., exploitation of fear) is also wrongful. *Viacom Int'l v. Icahn*, 747 F. Supp. 205, 210 (S.D.N.Y. 1990). Stated another way, both elements of extortion occur whenever one exploits fear to obtain property to which one has no lawful claim. *Id.*

The majority of other circuit decisions are coextensive with the Supreme Court opinion in *Enmons*. The First Circuit in *United States v. Sturm*, 870 F.2d 769 (1st Cir. 1989) held that "[U]nlike the extortion cases based on the use of force and violence, extortion cases based on economic fear typically will not involve allegations of wrongful means, but only allegations of wrongful ends." *Id.* at 773. The Seventh Circuit in *United States v. Lisinski*, 728 F.2d 887 (7th Cir. 1984) held that the term "fear" used in the Act included fear of economic harm or loss and that the extortion of, or preying upon, the victim's fear constituted wrongful use of fear. *Id.* at 891. The court in *United States v. Clemente*, 640 F.2d 1069, 1077 (2nd Cir. 1981) found a broad spectrum of legitimate business transactions can constitute wrongful means of obtaining property to which no lawful claim exists and held that fear of economic loss is not inherently wrongful but when used to achieve a wrongful purpose, its "use" is wrongful. *Id.*

The Court of Appeals correctly quoted *Enmons* stating "[a] threat is only 'wrongful' if the alleged extortionist 'has no lawful claim to the property.'" Appendix A-2. However, it thereafter contradicted well established Supreme Court case law and went on to find that even if Delta was not entitled to the money demanded, and it found this issue in dispute, because Delta has a right to terminate its relationship with travel agents for any reason or no reason that threatening to do what it had a contractual right to

do did not constitute a "wrongful" economic threat. Appendix A-3.

This is simply an incorrect statement of the law of extortion. The Court of Appeals relied exclusively on *Rothman v. Vedder Park Management*, 912 F.2d 315 (9th Cir. 1990) for the proposition that it is not extortion to threaten economic harm when you have legal right to engage in the activity you threaten. However, *Vedder* relies exclusively on a 1940 California case, *McKay v. Retail Auto. Sales Local Union No. 1067*, 16 Cal. 2d 311, 106 F.2d 373, 379 (1940), *cert. denied*, 313 U.S. 566, 61 S. Ct. 939, 85 L. Ed. 1525, which quotes the *dissent* in a 1896 Massachusetts case, *Vegalahn v. Guntner*, 167 Mass. 92, 107, 44 N.E. 1077, 1081 (1896) for the statement of extortion. These cases were simply not about extortion but based on acts of coercion. The Supreme Court in *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 123 S. Ct. 1057, 154 L. Ed. 2d 991 (2003) found that while coercion and extortion overlap, there has been and continues to be a recognized difference between these two crimes. *Id.* at 407-408. The court in *United States v. Hyde*, 448 F.2d 815 (5th Cir. 1971) illustrated the point that even though one has a right to do what one threatens to do, it makes no difference if one is not entitled to the property demanded when it gave the example of a policeman who threatens to arrest unless the arrestee pays him money. The court found that this is clearly extortionate although the policeman has a right and indeed often a duty to arrest, but did not have a right to the money demanded. *Id.* at 833. The state court cases relied on by the Court of Appeals for the statement of law in *Vedder* were decided well before the passage of the Hobbs Act, do not relate to extortion

and are a misstatement of existing case law of the Supreme Court and other circuits.

In this present case, the Court of Appeals conceded that a dispute existed as to whether Delta was entitled to the money either because no ticket errors were made (entitling Delta to nothing) or that Delta was not entitled to the amount alleged as "damages." Appendix A-2. These triable issues of material fact go to the heart of the predicate acts of extortion and wire and mail fraud which are the foundation of the RICO claims. If a jury were to find that Delta was not entitled to the money and Delta knew it,[7] then a pattern of extortion may be established as a predicate act under the RICO statute.

C. The Proceeding Involves a Question of Exceptional Importance in that the Result, if Left Undisturbed, Will Lead to the RICO Statute Being Eviscerated, Will Encourage Drafters of Both Commercial and Consumer Adhesion Contracts to be Intentionally Vague on Issues and Silent on Damages Leading to Potential Abuse by the Party with the Superior Power.

The Second Circuit in *Sedima, supra*, looked at a very similar fact pattern as this present case in which one

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[7] Delta's position is based on the fact that it believed that it had a right to the money based on the Agreement, but as the court in *United States v. Sturm*, 870 F.2d 769, 774 (1st Cir. 1989) pointed out, "We realize that many defendants will claim that they thought they were legally entitled to the property allegedly extorted. The factfinder is not obligated, however, to believe these claims." *Id.* Issues of credibility and intent are issues for the jury. *Harris v. Itzhaki*, 183 F.3d 1043, 1051 (9th Cir. 1999); *Morissette v. United States*, 342 U.S. 246, 274, 72 S. Ct. 240, 96 L. Ed. 2d 288 (1952).

party alleged that the other was intentionally overbilling based on an agreement and was, as perhaps the Ninth Circuit was in this present case, distressed that civil RICO was being used against "respected and legitimate enterprises." *Id.* at 360. Reversing the Second Circuit, the Supreme Court found that Congress wanted to reach both "legitimate" and "illegitimate" enterprises. The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. *Id.*

Notwithstanding, the law is well settled that RICO suits may be based on contractual relationships and it would appear that Delta's massive scheme against thousands of travel agents where it unilaterally adjudicates fault and levies damages, monetary and otherwise, with no need of any judicial determination, is the exact activity contemplated by the drafters of the RICO statute.

If the Court of Appeals decision is left to stand, it will essentially eviscerate over thirty years of evolving RICO case law and encourage intentionally vague adhesion contracts, while encouraging the drafting party to use that very contract as a vehicle and basis for various schemes to defraud in pursuit of additional profits. Surely, today, with the majority of airlines struggling to survive, the Court of Appeals decision if left unchecked, will encourage other airlines to use the ARC Agreement to wrongfully increase their profits through a pattern of extortion at the expense of the travel agent community and ultimately, at the expense of the consumer.

Review of the Court of Appeals decision through a writ of certiorari will yield a result for travel agents and potentially others that conforms to the teachings of the Supreme Court, restores harmony to the Circuits and preserves the integrity and intent of the RICO statute.

Respectfully submitted,

DILIP VITHLANI
DEAN BROWNING WEBB
LINDA S. PLATISHA
(*Counsel of Record*)

Attorneys for Petitioners All Direct Travel Services, Inc.; Donald McGenty dba Ann's Crossroads Travel Center; individually and on behalf of all those similarly situated

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALL DIRECT TRAVEL SERVICES, INC.; et al., Plaintiffs-Appellants, v. DELTA AIR LINES, INC., Defendant-Appellee.	No. 03-55620 D.C. No. CV-01-00902-AHS MEMORANDUM*

ALL DIRECT TRAVEL SERVICES, INC.; et al., Plaintiffs-Appellants, v. DELTA AIR LINES, INC., Defendant-Appellee.	No. 03-55910 D.C. No. CV-01-00902-AHS

Appeal from the United States District Court
for the Central District of California

(Filed Jan. 6, 2005)

Alicemarie H. Stotler, District Judge, Presiding

Argued and Submitted December 6, 2004
Pasadena, California

Before: REINHARDT, BEEZER, and WARDLAW, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

All Direct Travel and Ann's Crossroads Travel Center ("Plaintiffs") brought suit against Delta Airlines ("Delta") under the Racketeer Influenced Corrupt Organization Act [sic], 18 U.S.C. § 1961, *et seq.* ("RICO") and also asserted an equitable claim for unjust enrichment. The district court granted summary judgment for Delta on both claims. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

A. RICO Claim

To prevail on a civil RICO claim the plaintiffs must show, among other elements, a "pattern of racketeering activity." 28 U.S.C. § 1962. "'Racketeering activity' is any act indictable under several provisions of Title 18 of the United States Code," including extortion and mail and wire fraud. *Rothman v. Vedder Park Management*, 912 F.2d 315, 316 (9th Cir. 1990).

Extortion is defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951. Plaintiffs' claim that Delta has engaged in a pattern of extortion fails because Delta had a legal right under the Agent Reporting Agreement ("ARC Agreement") to collect damages for ticketing violations through the issuance of debit memos. *See U.S. v. Enmons,* 410 U.S. 396, 400 (1973) (holding that a threat is only "wrongful" if the alleged extortionist "has no lawful claim to that property"); *U.S. v. Dischner*, 974 F.2d 1502, 1516 (9th Cir. 1992) (same). Although the parties dispute whether the amounts charged in each debit memo are the actual measure of Delta's damages, and, in some cases, whether the ticketing violation even occurred, these issues concern the interpretation of the ARC Agreement and

amount to nothing more than a contract dispute. *See, e.g., Union Nat'l Bank of Little Rock v. Federal Nat'l Mortgage Association*, 860 F.2d 847, 857 (8th Cir. 1988) (holding that regardless of whether the defendant actually had a right to monies claimed, defendant's demands under the contract were not extortion because they "were motivated by [the defendant's] interpretation of the agreement").

In addition, Delta's threat to terminate its relationship with travel agents if they refuse to pay the debit memos does not amount to extortion because, under the ARC Agreement, Delta has the right to terminate its relationship with any travel agent for any reason or no reason. Therefore, threatening to do so is not a wrongful economic threat. *See Rothman*, 912 F.2d at 218 (holding that it is not extortion to threaten economic harm when you have a legal right to engage in the activity you threaten).

"Mail fraud under section 1341 requires the showing of a scheme to defraud involving use of the United States mails with the specific intent to defraud. Wire fraud under section 1343 requires the same showing, but involves use of United States wires." *Forsyth v. Humana*, 114 F.3d 1467, 1481 (9th Cir. 1997) (internal citation omitted). Plaintiffs' claim that Delta has engaged in a pattern of mail or wire fraud fails because, like the extortion claim, it relies on the notion that Delta is not permitted to issue debit memos because Plaintiffs disagree with Delta's damage calculations. Because Delta has the right under the ARC Agreement to issue debit memos, the debit memos do not falsely represent that Delta is authorized to collect these funds as Plaintiffs argue.

Because the plaintiffs have not raised a genuine issue of material fact as to any predicate acts under RICO, their

§§ 1962(a) and (c) RICO claims fail. Failure to show a possibility that a substantive RICO violation could be found precludes Plaintiffs' conspiracy claim under § 1962(d). *Howard v. America Online, Inc.*, 208 F.3d 741, 751 (9th Cir. 2000) (*cert. denied* 531 U.S. 828).

B. Unjust Enrichment Claim

"Unjust Enrichment is an equitable rather than a legal claim; consequently, no action for unjust enrichment lies where a contract governs the parties' relationship to each other." *McKesson HBOC, Inc. v. New York State Common Retirement Fund*, 339 F.3d 1087, 1091 (9th Cir. 2003). The ARC Agreement governs the issuance of debit memos. Debit memos are not removed from the purview of the contract simply because the contract does not specify the amount Delta may charge for ticketing violations. Any dispute over whether a ticketing violation occurred or how damages should be calculated must be determined by reference to the express contract and not principles of equity or quasi-contract.

C. Remaining Claims

As Plaintiffs' RICO and unjust enrichment claims fail on the merits, they are not entitled to declaratory or injunctive relief. Because we affirm the district court's grant of summary judgment in favor of Delta, we need not address the district court's denial of class certification.

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES – GENERAL

Case No.: SA CV 01-902-AHS (ANx) Date: April 14, 2003

Case Title: *ALL DIRECT TRAVEL SERVICES INC., etc., et al. v. DELTA AIRLINES, INC., et al.*

= =

PRESENT: THE HONORABLE ALICEMARIE H. STOTLER, JUDGE

Ellen Matheson	**Debbie Gale**
Courtroom Deputy	**Court Reporter**

ATTORNEY(S) PRESENT FOR PLAINTIFF(S):	**ATTORNEY(S) PRESENT FOR DEFENDANT(S):**
Linda S. Platisha	**Robert P. Berry**
Dean Browning Webb	**Mark E. Weber**
	Dilip Vithlani

PROCEEDINGS: 1) **Defendant Delta Air Lines' Motion for Summary Judgment;**

2) **Defendant Delta Air Lines' Rule 37 Motion to Restrict and Exclude Testimony of Plaintiffs' Experts Including Rebecca Goldin**

Court's tentative rulings issued to counsel before case called, copies of which are attached to this Minute Order. Cause called. Counsel argue.

1) Defendant Delta Air Lines' Motion for Summary Judgment: Court rules in accordance with its Tentative Ruling. Defendant's Motion is GRANTED. Court will

make an evidentiary ruling hereafter. Court will review the proposed Statement of Uncontroverted Facts and Conclusions of Law for propriety of use.

2) Defendant Delta Air Lines' Rule 37 Motion to Restrict and Exclude Testimony of Plaintiffs' Experts Including Rebecca Goldin: Court rules in accordance with its Tentative Ruling. Defendant's Motion is GRANTED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

THE HONORABLE
ALICEMARIE H. STOTLER, JUDGE, PRESIDING

TENTATIVE RULING ON
PRELIMINARY INJUNCTION

April 14, 2003 Calendar No. 2

CASE: *All Direct Travel Services, Inc, et al. v. Delta Air Lines, Inc.* SA CV 01-902 AHS (ANx)

MOTION PENDING: Delta Air Lines, Inc.'s Motion for Summary Judgment

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Plaintiffs allege the following predicate acts under the Racketeering Influenced and Corrupt Organization Act (RICO): (1) extortion under 18 U.S.C. § 1961(1)(B) and 18 U.S.C. § 1951; (2) federal mail and wire fraud under § 1961(1)(B) and §§ 1341 and 1343; and (3) interstate transportation of monies obtained by false pretenses and fraud and receipt of such monies under § 1961(1)(B) and §§ 2314 and 1315.

Plaintiffs fail to show as a matter of law or to present evidence raising a genuine issue that defendant's conduct constitutes predicate acts for civil claims under RICO. The contractual authorization to issue debit memos, which included claims and collection for damages for ticketing violations, and threats to terminate agent agreements do not constitute extortion. The debit memos about which plaintiffs complain do not demonstrate the intentional

misrepresentation of a material fact upon which plaintiffs relied to their detriment.

Injunctive relief is not available to private parties in civil RICO claims. Plaintiffs have failed to demonstrate an independent claim for declaratory relief.

The Court is inclined to grant defendant's motion for summary judgment.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

ALL DIRECT TRAVEL SERVICES, INC. DONALD MCGENTY d/b/a ANN'S CROSSROADS TRAVEL CENTER; AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, Plaintiffs, vs. DELTA AIR LINES, INC., Defendants.	Case No.: SA 01-902 AHS (Anx) DECLARATION OF JUDITH SCHUDA IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

DECLARATION OF JUDITH SCHUDA

I, Judith Schuda declare as follows:

1. My name is Judith Schuda and I am President of All Direct Travel Services, Inc. I submit this declaration in support of Plaintiffs' Opposition to Defendant, Delta Air Line, Inc.'s ("Delta") Motion for Summary Judgment. I have personal knowledge of the facts set forth in this declaration and I could and would testify competently testify, under oath, to these matters.

2. I began my career in the travel industry in 1983 as a travel agent with Carlson Travel where I remained until 1993. In 1993, I went to work for a large company as an in-house corporate agent and remained in that position until 1996.

3. In 1996 I opened All Direct Travel Services, Inc. At that time, I signed a Memorandum to the Airlines Reporting Corporation Agent Reporting Agreement. I was not given a copy of the Agent Reporting Agreement and did not see or have the opportunity to review the actual Agent Reporting Agreement. Thereafter, I received accreditation from the Airlines Reporting Corporation, which allowed me to sell tickets for all most [sic] major airlines.

4. When I started in the travel industry as a travel agent, the airlines paid travel agents a 10% commission on the base ticket fare for all tickets issued and higher commissions on international tickets. The various airlines also aggressively cultivated travel agents' support by having informative seminars, familiarization trips and other activities aimed at travel agents selling their individual airline product.

5. Up until the early 1990's, it was quite uncommon to receive a debit memo from an airline and if you did receive one, it would be relatively small in terms of dollars. Since approximately 1995, I have experienced a dramatic increase in the types of debit memos issued by Delta and the amount requested for these debit memos

6. In February of 1995, Delta announced that it would "cap" travel agents commission so that the most a travel agent could earn for the issuance of a ticket was $50.00 for a round trip ticket and $25.00 for a one way ticket. Within hours, almost all of the other major airlines instituted a similar policy.

7. Since that time, Delta and the other airlines have reduced commission several times and finally, in February of 2002, Delta announced that it would no longer pay travel agents any compensation for issuing tickets. Within a very short period of tine, all other airlines announced a similar policy.

8. As a result of the reduction and ultimate elimination of commissions, I was forced to begin charging my clients a service fee. As there was no efficient way to collect this fee, I secured my own merchant number to process credit cards.

9. While at one time, I felt that I was working on behalf of the airlines and the passenger, there is no question in my mind that I am an agent for and work exclusively for the benefit of my client as they are the ones paying me for the services I perform.

10. Since the first commission cut in 1995, and almost concurrently the increased dominance of the Internet in travel purchases, there has been a major

change in the way travel agents conduct their business. Rather than Delta "partnering" with travel agents to their mutual benefit, today, Delta actively competes with travel agents for customers and seeks to undercut and devalue a travel agents' service by offering lower prices on its own web site which are not available to be sold by travel agents through their computer reservation system. Since 1995, Delta has also set up rigid requirements that it does not have for its own reservation agents and for customers that book directly on its web site.

11. Some of these rigid and oppressive requirements of which I have personal knowledge include a marked increase in the types, number and value of debit memos in an attempt to collect additional revenue at the expense of travel agents. Delta has also sought to restrict the type of tickets issued by travel agents as well as excluding certain low fares from being sold by travel agents, which customers can purchase directly from Delta, through its web site, Delta.com or through Orbitz, an on line travel agency owned jointly by Delta and the other major airlines. This has caused my business to experience economic hardship and I have lost clients because of these restrictions.

12. The fear of receiving debit memos causes me to conduct my business in a less efficient manner than I would like. For example, I can no longer rely on my computer reservation system to give the lowest available fare for an itinerary because there are often lower fares available on Delta's web site. As a result, I must check Delta's web site and other web sites in order to get my clients the best possible prices. If I find a lower price, I will either direct my client to purchase through that web site or purchase the ticket on behalf of the client and charge them

a service fee. This is not an efficient process and takes considerable time and cost [sic] money to the agency. I have also started aggressively using consolidators. Consolidators are companies that purchase tickets from an airline at greatly reduced fares and resell them to travel agents. I often purchase the tickets from consolidators and then mark the ticket up and sell it to my clients. This enables me to receive additional compensation and for the client to receive a lower fare. Even if I was not ARC approved, I could still purchase Delta tickets through Delta's web site, Orbitz, other airline sites, and consolidators and mark them up and resell them to my clients.

13. As an agent for the customer, when a customer calls and specifically request [sic] an itinerary, we have an obligation to issue those tickets requested by a customer. With literally hundreds of fares in each market, each fare with over ten pages of rules attached to it and with fares changing as often as three times a day, we rely exclusively on our computer reservation system to determine the validity of a fare. Delta and the other airlines impliedly ratify the validity of a ticket when the computer reservation system, all owned by various airlines, automatically prices a ticket. When tickets are automatically generated by the computer, there is nothing incorrect or invalid about these tickets.

14. In or around April of 2001, a customer called and requested a round trip ticket from one of my agents. After reserving that ticket, the customer then called back and spoke with another agent and booked another round trip ticket with another of my agents. Both agents booked both tickets and had the computer automatically price the itineraries for each ticket. Shortly after the customer used

these tickets, Delta determined that she had not used all of the coupons and had violated Rule 100 of the contract of carriage. The contract of carriage is a contract between Delta and the passenger. Delta was aware that she had used coupons on these tickets out of order but did not confront her during her trip or later. Instead, Delta sent my agency a debit memo for over $1785.14. Delta contends that instead of the $565.00 the customer paid, she should have or would have paid $2280.00. In my many years experience as a travel agent, if a customer is willing to pay $565.00 for a ticket they would not be willing to pay $2280.00 for the ticket. In fact, they would not go on the trip or would go on Southwest, with its simplified rules and low fares. Additionally, the customer could have purchased one ticket on Delta and the other ticket on American for the same fare as paid with the same itinerary and thereby not triggering an audit for these alleged back-to-back tickets. In that scenario, Delta actual [sic] received revenue for an additional ticket. Further, this passenger did not use all four coupons and Delta more than likely, resold the unused, purchased seat.

16. I have reviewed a document that Delta has labeled as Exhibit F to the Declaration of Robert Berry in support of Delta's Motion for Summary Judgment, which purports to be a letter "To All Travel Professionals," concerning the practice of back-to-back ticketing. The letter is not dated, and although I maintain a file of correspondence with Delta, I have never seen that particular letter.

17. When I receive a debit memo, I spend a great deal of time resolving them because I know that if I do not pay, Delta will remove my ability to ticket on it [sic] airline. As my agency is largely geared to corporate travelers, this

would substantially reduce my ability to service my clients and impede me from expanding my business. Delta explicitly threatens to remove its ticketing ability if the debit memo is not paid. Additionally, I am aware that if debit memos are not paid, not only will Delta inhibit me from ticketing on its airline, it will also turn the debit memos over to a collection agency thereby jeopardizing my credit. Additionally, if Delta cancels my accreditation, all other airlines will be notified thereby jeopardizing my relationship with other airlines.

18. I did not believe that I owed Delta over $1700.00 due to a passenger's violation of a contract with Delta. Delta misrepresented that it charged the lowest applicable fare, but in reality, it charged four (4) one way fares even though the passenger only used half of the ticket. I called Delta and negotiated the amount owed and paid that amount under duress, knowing I did not owe anything but also knowing that Delta had the ability to ruin my business if I did not pay.

19. I am in constant fear of Delta's reprisal and fear retaliation if I challenge any of these policies. My fears were well founded as after I became a named plaintiff in this lawsuit, my Delta sales representative came to my office with a small override check from a special incentive contract I had with Delta. She indicated to me that it would be the last one due to my position as a plaintiff in this class action. Shortly thereafter, with no explanation, Delta cancelled all contracts with All Direct Travel causing a loss in revenue.

I declare under penalty of perjury that the foregoing declaration is true and correct. Executed this 2 of March, 2003 at Newport Beach, California.

/s/ Judith Schuda
Judith Schuda, President,
All Direct Travel Services, Inc.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

ALL DIRECT TRAVEL SERVICES, INC. DONALD MCGENTY d/b/a ANN'S CROSSROADS TRAVEL CENTER; AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, Plaintiffs, v. DELTA AIR LINES, INC., WORLDSPAN, LP, AND AIRLINES REPORTING CORPORATION(s), Defendants.	CASE NO. SA 01-902 AHS (Anx) **RESPONSES & OBJECTIONS TO PLAINTIFFS' SPECIAL INTERROGATORIES FROM PLAINTIFF DONALD MCGENTY DBA ANN'S CROSSROADS TRAVEL CENTER TO DEFENDANT DELTA AIR LINES, INC. (SET TWO) [SIC – SET THREE]**

* * *

issue in this case. Subject to and without waiver of these objections, Delta responds to this Interrogatory as follows:

THIS RESPONSE IS DESIGNATED *CONFIDENTIAL* PURSUANT TO THE PROTECTIVE ORDER GOVERNING CONFIDENTIAL INFORMATION

Based upon Delta's business records, the following table reflects the total amounts that Delta collected from domestic travel agencies for debit memos during the years reflected:

YEAR	AMOUNT
1994	$6,633,282*

1995	$6,671,912*
1996	$12,944,072*
1997	$11,605,773*
1998	$13,914,802*
1999	$35,596,242
2000	$27,880,254
2001	$31,161,054

For those years in which the figures set forth above are marked with an asterix, the reflected data is incomplete in that it does not include debit memos issued for credit card rejections, unreported sales, and possibly other matters. Collections information with respect to the omitted types of debit memos for those years is unavailable.

Interrogatory No. 5 [sic – Interrogatory 11]:

How much was Delta's receivable balance for debit memos at the end of 1997, 1998, 1999, 2000, and 2001.

* * *

Interrogatory No. 6 [sic – Interrogatory 12]:

How much did Delta write-off as bad debt for uncollected debit memos in 1997, 1998, 1998 [sic], 2000, and 2001.

Response:

In addition to the general objections set forth above, which are incorporated by reference into this response, Delta objects that this interrogatory is overbroad and unduly burdensome, and seeks information which is neither relevant nor reasonably calculated to lead to the discovery of admissible because it seeks information concerning debit memos that are outside the scope of the claims at issue in this case. Delta further objects that the interrogatory is vague and ambiguous. Delta assumes that

by "write-off as bad debt," the interrogatory seeks information on amounts which Delta initially demanded in debit memo payments, but which Delta subsequently reversed due to compromise, settlement, uncollectability, correction of Delta's error, or other reasons. Subject to and without waiver of these objections, Delta responds to this Interrogatory as follows:

THIS RESPONSE IS DESIGNATED *CONFIDENTIAL* PURSUANT TO THE PROTECTIVE ORDER GOVERNING CONFIDENTIAL INFORMATION

Based upon Delta's business records, the following table reflects the total amounts of debit memos issued by Delta to domestic travel agencies which were reversed, written off, waived or otherwise reduced by Delta due to compromise, settlement, uncollectability, correction of Delta's error, or other reasons during the years reflected:

YEAR	AMOUNT
1997	$8,158,354*
1998	$7,892,821*
1999	$36,189,329
2000	$27,376,178
2001	$20,476,213

For those years in which the figures set forth above are marked with an asterix; the reflected data is incomplete in that it does not include debit memos issued for credit card rejections, unreported sales, and possibly other matters. Collections information with respect to the omitted types of debit memos for those years is unavailable.

Interrogatory No. 7 [sic – Interrogatory 13]:

How many lawsuits have been brought by Delta for breach of fiduciary duty, in any court against travel agents during

the class period. For each lawsuit, please provide the case name, number, court, charges and disposition of that case.

Response:

Subject to the above referenced objections, and incorporating each by reference as if set forth fully herein, Delta states that it has been unable to identify any lawsuits it filed as a plaintiff during the class-period alleging breach of fiduciary duty by travel agents other than the collections lawsuits previously disclosed.

DATED: December 16, 2002

Mark E. Weber
Robert P. Berry
GIBSON DUNN &
CRUTCHER LLP

By: /s/ Robert P. Berry
Robert P. Berry

Attorneys for Defendant,
DELTA AIR LINES, INC.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-55620 and No. 03-55910

[ER 877]

* * *

Impact of Debit Memos

The majority of travel agency revenues from airline ticket sales are commissions-based. For most published airline fares, these commissions are a percentage of the gross fare amount (generally around 10%). Since the commission gained through the typical fare violation (10% of the more restrictive, lower priced fare) is much less than the difference in price to the passenger (between the less restrictive higher priced fares and the more restrictive, lower priced fare), the penalty of "getting caught" is several times the gain in revenue. The "break even" point for a travel agency considering whether to abuse fare restrictions requires a very low probability of "getting caught."

Given this economic trade-off, the deterrent effect of debit memos are actually several times their debit amounts. Relatively few debit memos can severely impact travel agency revenues. For example, if a travel agency violates fare restrictions to sell a $300 ticket which should have cost $450, a $150 debit memo (very common) would require the agent to sell an additional five $300 tickets (at 10% commission) just to break even. Once a ticket has been sold to a passenger (who probably was not willing to buy the correct, higher priced fare), a travel agent or airline has little chance of collecting additional funds from that passenger. In the above example, a penalization probability of ⅙ would be enough to economically deter a travel agency from violating fare restrictions.

It is important to note that the deterrent effect and collectability of fare audit debit memos (i.e. credibility of the system) is sensitive to the accuracy of the debit memos. Although implementing an automated international fare audit with 100% functionality may never be practical, it is imperative to implement functionality correctly and to properly exclude transactions which will not be processed correctly. This exclusion or screening process should be incorporated proactively in the initial job stream. From an [sic] travel agent's perspective, it takes relatively few errant memos). Errant debit memos also cost the airline by generating a needless amount of travel agency correspondence.

Current Systems

The current PRA software includes a sales-based fare audit for domestic published fares and all unpublished fares. Traditionally, airlines have underestimated the extent of agent abuse or have been unable to systematically audit international tickets due to volume, complexity, and data quality.

In auditing the total fare amount on a ticket, there are essentially two different approaches:

1) Itinerary Pricing – Reprice the entire ticket using the itinerary and booking classes to find the combination of constructions, farebreak definitions, and fares which will provide the lowest applicable total fare amount. This approach does not provide an audit trail of what is incorrect on the original ticket.

2) Back-End Audit – Audit the original farebreaks/ constructions on a ticket to identify specific violations and

replace the invalid farebreaks in the construction with logical replacement fares. This approach does not necessarily ensure the lowest applicable replacement value.

The current domestic published fare audit in the PRA system uses the back-end audit approach. This approach provides detailed violation information which enhances the legitimacy of debit memos and minimizes agency disputes.

* * *

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

ALL DIRECT TRAVEL, INC., DON McGENTY dba ANN'S CROSSROADS TRAVEL CENTER, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED. Plaintiffs, v. DELTA AIR LINES, INC., et al. Defendants.	Case No.: SA 01-902 AHS (Anx) DECLARATION OF DILIP VITHLANI IN SUPPORT OF PLAINTIFFS' REPLY BRIEF TO DEFENDANT'S OPPOSITION TO MOTION FOR CLASS CERTIFICATION DATE: January 13, 2003 TIME: 10:00 AM PLACE: Courtroom of the Honorable Alicemarie Stotler (Filed Jan. 6, 2003)

I, DILIP VITHLANI hereby declare as follows:

I am an attorney at law, licensed to practice before all the courts in the State of California and all the Federal Courts in California. I am one of the attorneys of record in the above-entitled action. I have personal knowledge of the facts, set forth in this declaration except for those matter stated upon information and belief. As to those matter, I believe them to be true. If called upon to testify, can and will competently testify thereto.

1. My responsibilities in this litigation include management and interpretation of electronic discovery, database creation management and upkeep.

2. During discovery, Delta Airlines Inc., (Delta) has produced a CD Rom (Bates No. DL-0013176) containing 4 databases, namely Memo Data Table; Coupon Data Table; Reason Remark Surcharge Table, and, Reason Code Table.

3. My review of the databases produced by Delta reveals that the database that contained the Audited Fare Code used to issue debit memos is contained in the Coupon Data Table Which has 542,197 rows and 16 columns; and the dollar value for each of the debit memos is contained in the Memo Data Table which contains 363,630 rows and 29 columns. These two databases are separate and have only one common column, namely the Sequence number key to each memo.

4. In order to determine the dollar value of debit memos that fall within the class parameters, I integrated the two databases and determined the following:

5. For the year 2001, the database contains 5927 debit memos within the class parameters for a total value of

$5,144,952.33 and an average value per debit memo of $868.05.

6. The database contains 246,631 debit memos, which are not within the class parameters for a total of $25,401,620.05 and average approximately $102.99 per memo.

7. The total dollar value of the debit memos in the database is $36,516,643.03.

8. Based on defendant's responses to Interrogatories the database contains less than 20% of the debit memos issues for the class period.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 6th day of January, 2003 at Norwalk, California.

/s/ Dilip Vithlani
Dilip Vithlani, Declarant